



Billing Code 4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket Nos. FWS-R4-ES-2012-0068; FWS-R4-ES-2013-0010]

[4500030114]

RIN 1018-AY19; 1018-AZ42

**Endangered and Threatened Wildlife and Plants; Threatened Status for the Spring
Pygmy Sunfish and Designation of Critical Habitat**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening

of the public comment period on our October 2, 2012, proposed listing and designation of critical habitat for the spring pygmy sunfish (*Elassoma alabamae*) under the Endangered Species Act of 1973, as amended (Act). In this document, we propose a slight reduction to the size of the proposed designation based on public input. We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat for spring pygmy sunfish and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the revised proposed rule, the associated DEA, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

DATES: *Written comments:* We will consider comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: *Document availability:* You may obtain copies of the revised proposed rule and the draft economic analysis on the Internet at <http://www.regulations.gov> at Docket Number FWS-R4-ES-2012-0068, or by mail from the Mississippi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Written comments: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. For comments on the proposed listing of this species, search for Docket No. FWS–R4–ES–2012–0068, which is the docket number for the listing portion of the proposed rulemaking. For comments on the proposed critical habitat designation for this species, search for Docket No. FWS–R4–ES–2013–0010, which is the docket number for the critical habitat portion of the proposed rulemaking.

(2) *By hard copy:* For comments on the proposed listing of this species, submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2012–0068; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203. For comments on the proposed critical habitat designation for this species (including the economic analysis), submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2013–0010; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments **only** by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more details).

FOR FURTHER INFORMATION CONTACT: Stephen Ricks, Field Supervisor, Mississippi Ecological Services Field Office, 6578 Dogwood View Parkway, Jackson, MS 39213; by telephone (601-321-1122); or by facsimile (601-965-4340). If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed listing and designation of critical habitat for the spring pygmy sunfish that was published in the **Federal Register** on October 2, 2012 (77 FR 60180), the revision to the proposed critical habitat boundaries of Unit 1 described in this document, our DEA of the proposed designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties.

We are also notifying the public that we will publish two separate rules for the final listing determination and the final critical habitat determination for the Spring pygmy sunfish. The final listing rule will publish under the existing docket number, FWS-R4-ES-2012-0068, and the final critical habitat designation will publish under

new docket number FWS–R4–ES–2013–0010.

We will consider information and recommendations from all interested parties on both determinations. As to the proposed listing determination, we are particularly interested in comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(2) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of this species, and ongoing conservation measures for these species and its habitat.

(4) Current or planned activities in the areas occupied by this species and possible impacts of these activities on this species.

As to the proposed critical habitat determination, we are particularly interested in comments concerning:

(5) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(6) Specific information on:

(a) The distribution of the spring pygmy sunfish;

(b) The amount and distribution of spring pygmy sunfish habitat; (c) What areas occupied by the species at the time of listing that contain features essential for the conservation of the species we should include in the designation and why; and

(d) What areas not occupied at the time of listing are essential to the conservation of the species and why.

(7) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(8) Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(9) Information on the extent to which the description of economic impacts in the DEA is complete and accurate.

(10) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(11) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you submitted comments or information on the proposed rule (77 FR 60180) during the initial comment period from October 2, 2012, to December 3, 2012, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination.

You may submit your comments and materials concerning the proposed rule or DEA by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and DEA, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R4–ES–2012–0068 for the proposed listing, and at Docket No FWS–R4–ES–2013–0010 for the proposed critical habitat, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Mississippi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the spring pygmy sunfish in this document. For more information on previous Federal actions concerning the spring pygmy sunfish, or information regarding its biology, status, distribution, and habitat, refer to the proposed designation of critical habitat published in the **Federal Register** on October 2, 2012 (77 FR 60180), which is

available online at <http://www.regulations.gov> (at Docket No. FWS–R4–ES–2012–0068) or from the Mississippi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On October 2, 2012, we published a 12-month finding and a proposed rule to list the spring pygmy sunfish as threatened with critical habitat (77 FR 60180). We proposed to designate approximately 8 stream miles (mi) (12.9 kilometers (km)) and 1,617 acres (ac) (654.4 hectares (ha)) of spring pool and spring-influenced wetland in Limestone County, Alabama, for designation as critical habitat. We will submit for publication in the **Federal Register** a final listing decision and critical habitat designation for the sunfish on or before October 2, 2013. In 2012, Belle Mina Farms, the owner of Beaverdam Spring, Moss Spring, and the upper reach of Beaverdam Creek, in Limestone County, Alabama, and the Service entered into a candidate conservation agreement with assurances (CCAA) for a population of spring pygmy sunfish. We are currently negotiating additional CCAs with other landowners in the Beaverdam Spring system.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation

of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

New Information and Changes from the Previously Proposed Critical Habitat

The owner of property adjacent to the southwestern boundary of the proposed critical habitat contacted the Service by phone, and later through public comment, in regard to a boundary error in the proposed rule. In the proposed rule, we mistakenly included about 67.6 acres (27.3 ha) of his land as critical habitat, believing this land was part of Federal Government land within the Wheeler National Wildlife Refuge (Refuge). After being contacted by the landowner, we rechecked our records and verified land ownership with the Refuge. We have no records that this land was occupied historically by the species, and upon examination, we determined that it does not presently contain any of the primary constituent elements identified in the proposed rule. We therefore find that this land is not essential to the conservation of the spring pygmy sunfish. After this 67.6-acre reduction, the total proposed critical habitat acreage is reduced from 1,617 ac to 1,549.4 ac (627.02 ha). The revised map of proposed critical habitat for Unit 1 is

provided below in the **Proposed Regulation Promulgation** section of this document.

We are also providing an updated index map of the critical habitat to reflect the changes to Unit 1 described above, and an updated map of Unit 2 that uses a revised map legend. We are not proposing any changes to the proposed boundaries of Unit 2 in this document. The revised index map and map of Unit 2 are also provided below in the **Proposed Regulation Promulgation** section of this document.

Consideration of Impacts under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any

benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of the spring pygmy sunfish, the benefits of critical habitat include public awareness of the presence of the species and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for this species due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

We have not proposed to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation (DEA), which is available for review and comment (see **ADDRESSES**).

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for the spring pygmy sunfish. The DEA separates conservation measures into two distinct categories according to “without critical habitat” and “with critical habitat” scenarios. The “without critical habitat” scenario represents the baseline for the analysis, considering protections that would be otherwise afforded to the spring pygmy sunfish (e.g., if we list the species as threatened and under other Federal, State, and local regulations). The “with critical habitat” scenario describes the incremental impacts specifically due to designation of critical habitat for the species. In other words, these incremental conservation measures and associated economic impacts would not occur but for the designation. Conservation measures implemented under the baseline (without critical habitat) scenario are described qualitatively within the DEA, but economic impacts associated with these measures are not quantified. Economic impacts are only quantified for conservation measures implemented specifically due to the designation of critical habitat (i.e., incremental impacts). For a further description of the methods employed, see Section 1.4, “Framework for the Analysis” of the DEA.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for the spring pygmy sunfish over the next 20 years, which was determined to be the appropriate period for analysis because limited planning information is available for most activities to forecast activity levels for projects beyond a 20-year timeframe. It identifies potential incremental costs as a result of the

proposed critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing.

The DEA quantifies economic impacts of spring pygmy sunfish conservation efforts associated with the following categories of activity: (1) Residential, commercial and industrial development; (2) transportation and utilities; (3) groundwater and surface water extraction; (4) silviculture, agriculture, and grazing; and (5) dredging, channelization, and impoundment. Employing a 7 percent discount rate, the DEA estimates that the total incremental cost of the designation will be \$150,000 over the next 20 years, or approximately \$13,000 annually. The DEA states that in both units, the incremental impacts of the critical habitat designation would be limited to additional administrative costs to the Service, Federal agencies, and private third parties. Most of these impacts (\$82,000) are associated with Unit 1 (Beaverdam Spring/Creek), with the remainder associated with Unit 2 (Pryor Spring/Branch). As Unit 1 is occupied by the sunfish, any conservation efforts the Service would recommend to avoid adverse modification of critical habitat would most likely be recommended to avoid jeopardy. Since Unit 2 is not occupied by the sunfish, impacts of any conservation efforts implemented for the benefit of the sunfish would be due solely to the designation of critical habitat. Transportation and utility activities are likely to be subject to the greatest incremental administrative impacts (forecast to be \$85,000); followed by development (\$49,000) and silviculture, agriculture, and grazing (\$18,000) (all estimates expressed as present values over 20 years, assuming a 7 percent discount rate). No incremental

impacts are anticipated for dredging, impoundment, and channelization, as these activities have not occurred within the study area for the past 10 years, and are not forecast to occur in the future. Please refer to the DEA for a more detailed discussion of study results.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule and our amended required determinations.

Required Determinations—Amended

In our October 2, 2012, proposed rule (77 FR 60180), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Orders (E.O.s) 12866 and 13563 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President’s memorandum of April 29, 1994, “Government-to-Government

Relations with Native American Tribal Governments” (59 FR 22951). However, based on the DEA data, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rulemaking.

According to the Small Business Administration, small entities include small

organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

To determine if the proposed designation of critical habitat for the spring pygmy sunfish would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as agricultural producers. In order to determine whether it is appropriate for our agency to certify that this proposed rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that

do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. If we finalize the proposed listing for this species, in areas where the spring pygmy sunfish is present, Federal agencies would be required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the spring pygmy sunfish. The only costs expected to be borne by third parties as a result of the proposed rule are portions of the total cost of each section 7 consultation action forecast for development activities. The DEA concludes that the proportion of small entities that may be affected is approximately 0.6 percent (one entity per year), and that the average cost incurred by each entity being affected is approximately 0.01 percent of estimated annual revenues. Please refer to the DEA of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly

regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts, if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the E.O. regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. Information

for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. We have estimated that approximately one entity per year may be impacted by the proposed critical habitat designation, at a cost of an estimated \$510 per entity. These cost estimates are based on administrative costs associated with the proposed designation. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Authors

The primary authors of this notice are the staff members of the Mississippi Ecological Services Field Office, Southeast Region, U.S. Fish and Wildlife Service.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, which was proposed to be amended at 77 FR

60180, October 2, 2012, as follows:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245;
Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.95(e), in the proposed entry for “Spring Pygmy Sunfish (*Elassoma alabamae*),” revise paragraphs (e)(5), (e)(6), and (e)(7)(ii) to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

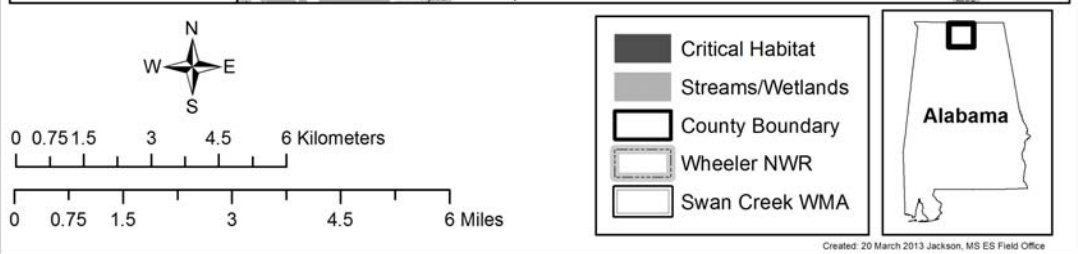
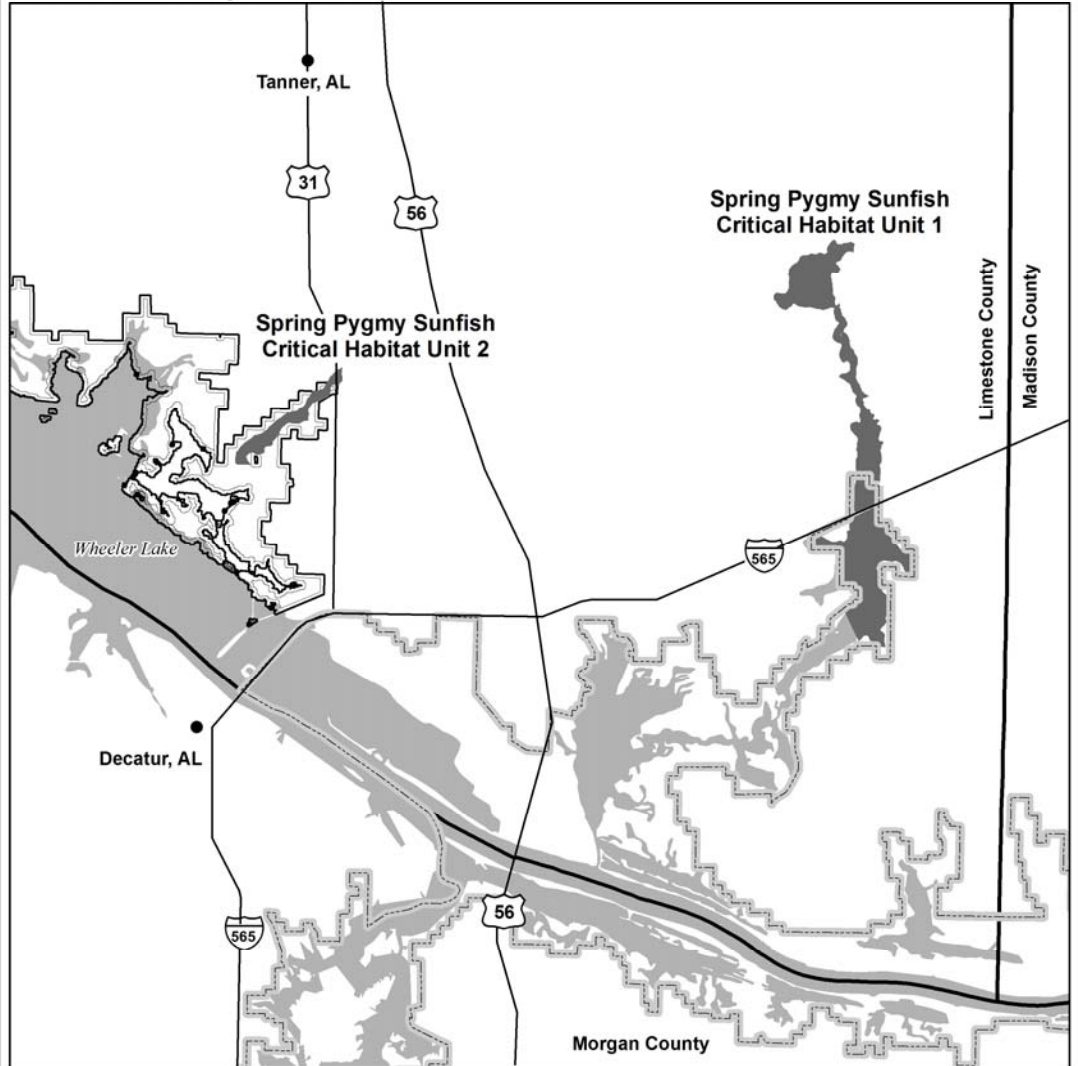
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Spring Pygmy Sunfish (*Elassoma alabamae*)

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- (5) Index map of critical habitat for the spring pygmy sunfish follows:

Index Map
Critical Habitat for the Spring Pygmy Sunfish
Limestone County, Alabama

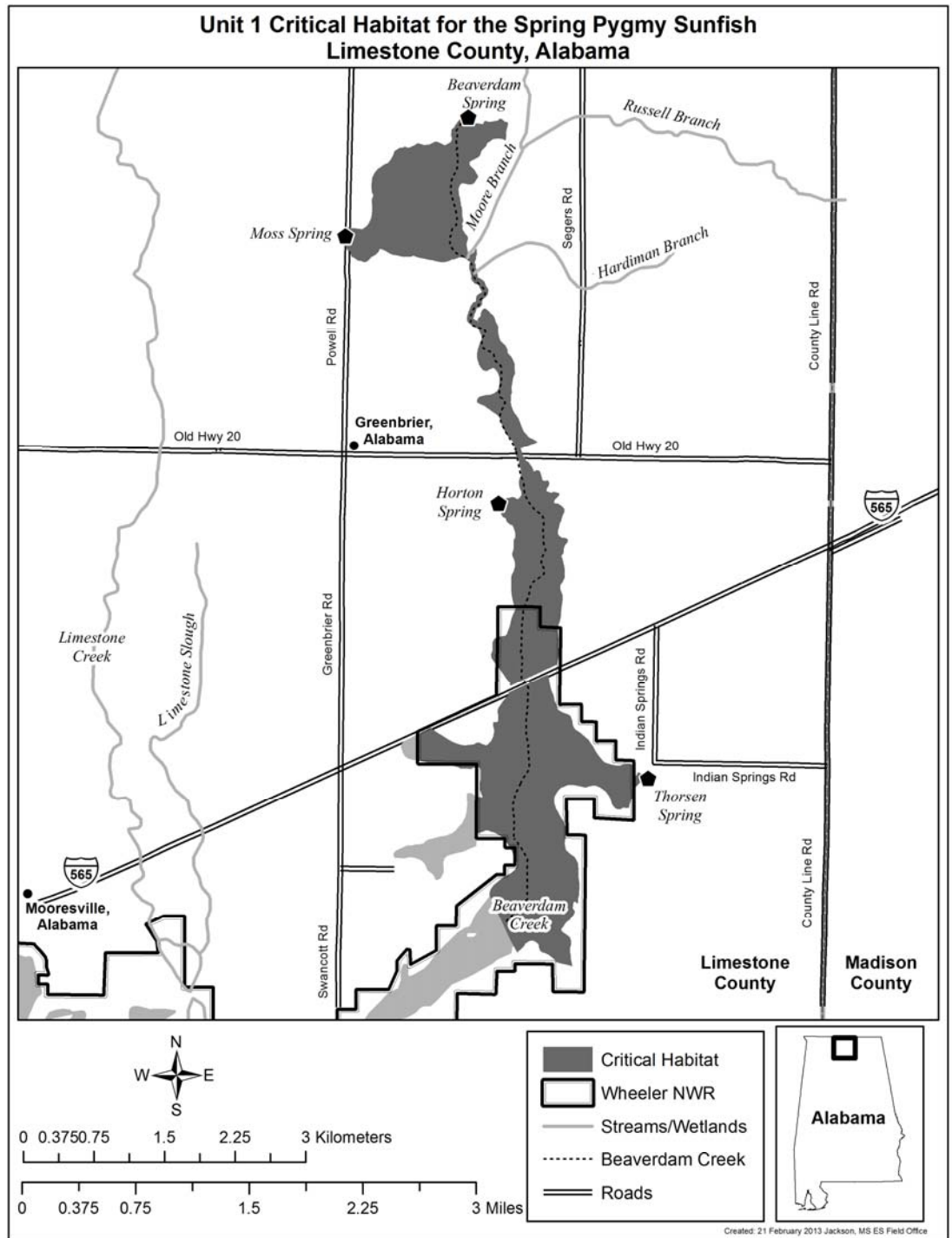


Created: 20 March 2013 Jackson, MS ES Field Office

(6) Unit 1: Beaverdam Spring/Creek, Limestone County, Alabama.

(i) *General Description:* Unit 1 includes a total of 9.5 km (5.9 mi) of Beaverdam Spring/ Creek, northeast of Greenbrier, Alabama, from the spring head, 5.6 km (3.5 mi) north of Interstate 565 (Lat. 34.703162, Long. -86.82899) to 3.9 km (2.4 mi) south of Interstate 565 (Lat. 34.625896, Long. -86.82505). Unit 1 encompasses Moss, Horton, and Thorsen springs. This includes a total of 553.2 hectares (1,367 acres).

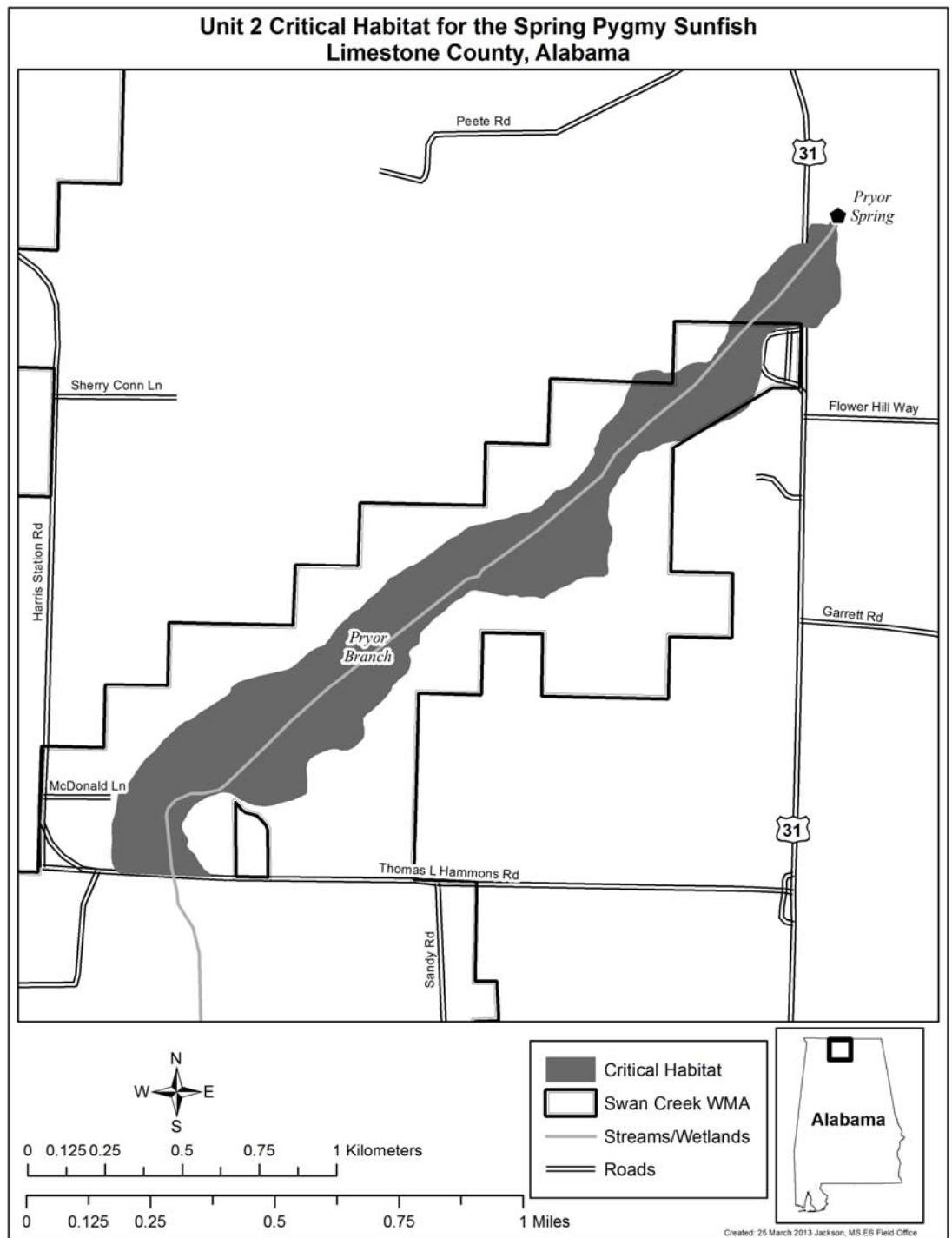
(ii) Map of Unit 1 follows:



(7) * * *

(i) * * *

(ii) Map of Unit 2 follows:



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Dated: April 12, 2013 _____

Rachel Jacobson

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

[FR Doc. 2013-09974 Filed 04/26/2013 at 8:45 am; Publication Date:
04/29/2013]